(3)

No. 84-1360

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

THE CITY OF RENTON, et al,
Appellants,

vs.

PLAYTIME THEATRES, INC.
a Washington corporation, et al
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

MOTION TO AFFIRM

Jack R. Burns*
Jack R. Burns, P.S.
10940 N.E. 33rd Place
Suite 107
Bellevue, WA 98004
(206) 828-3636
Robert E. Smith
16133 Ventura Blvd.
Suite 1230
Encino, CA 91436
(213) 981-9421
Counsel for Appellees

* Counsel of Record

23 pp

No. 84-1360

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

THE CITY OF RENTON, et al,
Appellants,

vs.

PLAYTIME THEATRES, INC.
a Washington corporation, et al
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

MOTION TO AFFIRM

Jack R. Burns*
Jack R. Burns, P.S.
10940 N.E. 33rd Place
Suite 107
Bellevue, WA 98004
(206) 828-3636

Robert E. Smith
16133 Ventura Blvd.
Suite 1230
Encino, CA 91436
(213) 981-9421

Counsel for Appellees

* Counsel of Record

PARTIES

Appellants: City of Renton; Barbara Y. Shinpoch, Mayor; Earl Clymer, Robert Hughes, Nancy Mathews, John Reed, Randy Rockhill, Richard Stredicke, and Tom Trimm, members of the Renton City Council; and Jim Bourasa, acting Chief of Police of the City of Renton.

Appellees: Sea-First Properties, Inc., f/k/a Kukio Bay Properties, Inc., and Playtime Theatres, Inc., both Washington corporations.

NOTE: The term "aff.," "test.," "dep." refer to "affidavit," "testimony" and "deposition" respectively. "Cl." refers to David R. Clemmens, Renton's Policy Development Director; "Bond" refers to Robert Bond, an executive with Sterling Recreation Organization, a general audience entertainment company operating throughout the Western United States.

TABLE OF CONTENTS

TABLES OF AUTHORITY

Table of Cases

Page

Constitutional Provisions

Rules and Ordinances

MOTION TO AFFIRM

Appellees respectfully move to affirm the judgment of the United States Court of Appeals for the Ninth Circuit pursuant to Supreme Court Rules 16.1(c) and (d).

STATEMENT OF THE CASE

Essential Facts Have Been Misstated By Appellants Which Change The Nature Of The Legal Issues.

Appellants' statement of the case charts the history of these ordinances, but it contains several glaring misstatements of fact. In the preface to the "Questions Presented," on page (i) of the Jurisdictional Statement, Appellants assert that prior to the entry or attempted entry of any adult motion picture theater, the City effectively set aside 520 acres of developing commercial area for such theaters. This statement is untrue and distorts the history of these ordinances. Ordinance No. 3526, the only ordinance passed before Appellees' entry into the Renton marketplace, provided only 400 acres of total land[1] which included land within the Boeing Aircraft manufacturing facility[2], the metro sewage treatment plane,[3] and the Longacres race track and environs.[4] As a practical matter, far less land was

---

[1] Cl. aff., January 27, 1982, at 6.

[2] Id. attached map, Site A; Cl. test., January 29, 1982, at 14.

[3] Cl. aff., January 27, 1982, attached map, Site B; Cl. test., January 29, 1982, at 15.

[4] Cl. aff., January 27, 1982, attached map, Site D; Cl. test., Jan. 29, 1982, at 19.

actually available, less than 200 acres.[5] Most of the available land was within a flood plain and further limited by easements for railroad spurs and a natural creek which meandered through the allegedly available land area.[6]

Only after Appellees' lawsuit was commenced did the City of Renton amend Ordinance No. 3526 to reduce the patently unconstitutional restriction on locating nearer than one (1) mile to a school. App. 87a. While this change enlarged the total available area, it did nothing to enhance the quality of the available sites.[7]

Another distortion of the genesis of these ordinances is found on page five (5) of the Jurisdictional Statement, immediately after footnote 6, where

---

[5] The planning director acknowledged that all "available" land, as he used the term, was not in fact available. Cl. dep., March 3, 1982, at 38-40. He further testified that already developed land could not be used, practically speaking, for an adult theater. Cl. test., June 23, 1982, at 87.

At page 17 of the Jurisdictional Statement, Appellants for the first time in this case suggest that the Metro sewage treatment plant and the Longacres race track and environs are not within the available land area. Appellants' belated attempt to pervert the record cannot be defended. The planning director testified that both facilities were within the available land area of Ordinance No. 3526. See footnotes 3 and 4. Also, Renton's objections to the Magistrate's report and Recommendation regarding Appellees' motion for a Preliminary Injunction (CR 143 at 16) extolls the fact that the area available to an adult theater includes the Longacres Race Track. Ordinance No. 3629's only effect on the available land area was to add to it by reducing the separation distance required from schools. Thus, all land "available" under Ordinance No. 3526 continued to be "available" under Ordinance No. 3629.

[6] Cl. test., January 29, 1982, at 22 and 27-30.

[7] Bond aff., June 15, 1982, at 5.

Appellants describe the legislative hearings as being the source of testimony about the impact of adult theaters on property values, crime, residential neighborhoods, and children. Appellants suggest they received and studied the documents underlying the Seattle ordinance as well as the approaches taken by numerous other cities within and without the State of Washington. The record below clearly fails to establish a long period of careful preenactment study. In fact, quite to the contrary, it affirmatively shows no such review at all. No written or legislative history exists from which it is possible to discern exactly what was considered by the Renton City Council in enacting Ordinance No. 3526.[8] No expert evidence or factual evidence regarding the effects of adult entertainment uses on neighborhood or business districts was received.[9] The City of Renton did not receive and study any material relative to the effects of adult businesses, and particularly adult theaters, upon the community.[10] All of the material allegedly studied by Renton dealt with the *legality* of regulation rather than the underlying reasons and justifications for regulation.

The documents the planning director received "underlying" the Seattle ordinance were the decision in *Northend Cinema, Inc. v. City of Seattle,* 90 Wn.2d 709, 585 P.2d 1153 (1978), cert. denied, 441 U.S. 946 (1979), and a discussion of legal cases relative to the propriety of regulating adult businesses.[11] The testimony concerning crime being a secondary effect of a single adult theater came from an unidentified

---

[8] Cl. dep., March 3, 1982, at 44.

[9] Id. at 49; Cl. test., January 29, 1982, at 33.

[10] Cl. dep., March 4, 1982, at 5-12.

[11] Id. at 11-12.

source, and no effort was made to verify this mere assertion.[12] No effort was made to contact the cities of Tacoma, Pasco or Bremerton, or other small cities within the State of Washington where adult theaters are located, to determine if such businesses presented any unique problem.[13] Nothing in the legislative record indicates that empirical evidence from any source was received relative to the impact, if any, of adult businesses, let alone a single adult theater, on commercial property values.[14] While Appellants assert here that there was testimony during the legislative hearings about the impact of adult theaters on neighborhoods and their effect on children, the record below undeniably establishes that the City was unable to identify what those impacts or effects would be.[15] Finally, the review of "the approaches taken by numerous other cities, inside and outside the State of Washington," related solely to a review of ordinances and legal decisions, a "how to" review rather than a review and study of why it may be necessary to regulate and how to narrowly tailor a response to a particular problem.[16] The record reflects that the planning director did not even review a substantial amount of the "how to" material available to him.[17]

---

[12] Id. at 14.

[13] Id. at 15.

[14] Id. at 17-18.

[15] Id. at 42-44.

[16] Id. at 5-12.

[17] Id. at 9-10.

ARGUMENT

A. The Ninth Circuit's Ruling That Renton Could Not Rely Solely On The Experience Of Other Cities Is Justified By The Facts Of This Case.

Appellants allege that the Ninth Circuit erred in ruling that Renton could not rely upon the experiences of other cities in enacting its adult theater zoning ordinance.[18] This incorrectly states the holding of the Court below. The Court, in fact, found that Renton *could* rely on such information; however, in the context of this case, those experiences were insufficient. *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 537 (9th Cir. 1984).

> We do not say that Renton cannot use the experiences of other cities as part of the relevant evidence upon which to base its actions, but in this case those experiences simply are not sufficient to sustain Renton's burden of showing a significant governmental interest.

As noted above, the legislative record was devoid of any empirical evidence to support the regulations of the ordinance.[19] Cases of this Court, where First Amendment concerns were involved, have required more than mere assertions and conclusions to support legislative burdens on First Amendment rights. They have required evidence that adult businesses pose problems more significant than those associated with various other permitted uses. *Shad v. Borough of Mt.*

---

[18] Jurisdictional statement at 13.

[19] See pages 3 and 4, infra.

Ephraim, 452 U.S. 61, 73 (1981). Justice Blackmun, in his concurring opinion in *Shad* pointed out that "the zoning authority must be prepared to articulate and support a reasoned and significant basis for its decision." *Shad*, at 77. The city must buttress its assertions with evidence that the state interest has a basis in fact and that factual basis was considered by the city in passing the ordinance. *Shad*, supra, (rejecting, for want of a factual basis, asserted reasons given in support of an ordinance that restricted First Amendment rights). Every circuit court that has considered the question has reached the same result.[20]

These decisions and the decision of the Ninth Circuit are not in conflict with the decision in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980). There, the Court's ruling was carefully limited to review of a single provision requiring 500 feet separation between adult uses. The proffered justification was to avoid the adverse secondary effects of concentration. (See footnote 31, infra). These means, to further an admittedly substantial governmental purpose, were approved in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Renton need not have conducted its own research into this area if the ordinance were designed to prevent the blighting effects of concentration.

The Ninth Circuit properly declined to follow the rule of *Genusa* upon which Appellants rely because Renton's ordinance is clearly unrelated to the effects of concentration inasmuch as clustering has not been

[20] *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Fantasy Bookshop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981); *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981); and *CLR Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983).

prohibited. Further, Renton has failed to articulate and substantiate another compelling governmental purpose or show that the least intrusive means have been used to accomplish that purpose.

No "factual evidence" of any sort was presented to the legislative body; rather, at best, it heard only unsubstantiated assertions and conclusions. Against this backdrop must be measured the substantiality of the evidentiary value of the experiences of those cities which were considered by Renton. The experience of other cities has no evidentiary value unless (1) those experiences have actually been considered and (2) those experiences are relevant to the problems facing the reviewing city. With respect to Detroit, it is clear that Renton only considered the decision of this Court[21] and with respect to Seattle it only considered the decision of the Washington State Supreme Court and some associated legal briefing.[22] None of the underlying studies, testimony, scientific data, or expert opinions were reviewed to determine if the situations experienced by those cities presented similar or different problems than those Renton felt were presented by adult businesses. In reality, Renton did not study or rely on the experiences of other cities, it relied on court decisions. Court decisions cannot supply the evidentiary bulwark necessary to support the substantial justification required as a predicate to intrusion into First Amendment freedoms.

The record is clear that neither the city council nor its planning department actually observed, studied, or found out anything about the effects of adult theaters or businesses. In fact, the planning director conceded

[21] Id. at 8; Cl. test., January 29, 1982, at 37.

[22] See footnote 11.

that the only significant operational characteristic distinguishing a general release theater from an adult theater was the image on the screen.[23] The only unique problems such a theater might pose operationally were traffic and signage, both of which could have been dealt with by less intrusive means.[24]

As the Ninth Circuit pointed out, the means chosen by Renton to solve its alleged problems are different than those chosen by Seattle or Detroit, and much more intrusive on First Amendment activity. *Playtime Theatres, Inc.*, 748 F.2d at 536. It is not enough for a local government to articulate an interest, it must be prepared both to articulate and support a reasoned and significant basis for its zoning decision. *Shad*, 452 U.S. at 77 (Blackmun, J., concurring).

In summary, the Ninth Circuit Court of Appeals has not set arbitrary boundaries on the type of evidence a city council may consider. Rather, in accordance with the decisions of this Court, it has merely required that the evidence be factual, be actually considered, and be more than mere assertions. These minimum requirements are necessary because (paraphrasing this Court in *Shad*), it is not "self-evident" or "immediately apparent as a matter of experience" that a single adult theater presenting nonobscene movies would pose problems more significant than those associated with permitted uses, including a general release motion picture theater. 452 U.S. at 73-74.

---

[23] Cl. dep., March 4, 1982, at 21-22.

[24] Id.

B. Where Overly Restrictive Means Are Chosen To Implement A Zoning Scheme, Economically Unattractive Land Should Not Be Considered Constitutionally Available.

The Ninth Circuit's finding that the land set aside for the use of adult theaters in Renton is substantially unavailable is premised upon a two-prong analysis. The first part of that analysis involves the question of whether or not the land is viable. A theater must be located in a place where people are willing to go in the nighttime, that provides easy parking and is generally a focal point of nighttime recreation activity.[25] If no viable locations exist, the burden on protected expression is substantial and will not survive close scrutiny.[26] The other question which must be answered, if viable locations exist, is, "Are they in fact available?" If they are not available, or are not likely to become available, the burden on speech is as great as if the speech activity had been banned. The testimony offered by both parties below supports the finding of the Ninth Circuit on this issue that insufficient viable sites were available, thus creating a substantial burden on protected expression. With the exception of one site, which was probably not large enough, all of the allegedly set aside land was totally unsuited for use by a retail/recreation oriented business

---

[25] Aff. Bond, June 15, 1982, at 4.

[26] *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir., 1983); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir., 1982); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981); *Norton Street Book Shoppe, Inc. v. Village of Endicott*, 582 F. Supp. 1428 (N.D.N.Y. 1984)

such as a motion picture theater (whether adult or general release).[27] The planning director testified that an appropriate land use area for a motion picture theater would be in a neighborhood shopping center or in an area where more general business activity occurred.[28] He agreed that it would be inconsistent with good land use practices to place a motion picture theater in a heavy industrial area.[29] Finally, he readily acknowledged that a motion picture theater is a commercial oriented business that should locate with other commercial businesses of the same nature or intensity so that there is a compatibility of use, sharing of customers, trade and traffic.[30]

It is clear from the record that none of the alleged land set aside meets these agreed criteria. Appellants simply misread and distort the holding below on this issue. No where did the Court require that property be immediately available for purchase. Rather, the Court ended its inquiry when it determined that the set aside land was not viable and therefore not available. The question presented by Appellants goes beyond the holding of the Ninth Circuit and asks this Court to decide an issue not considered by the lower court.

Given the record below, the proper focus of the inquiry should be whether a governmental entity may constitutionally relegate adult theaters to the most unattractive, undesirable, economically unviable areas of the city without articulating and substantiating a unique problem associated with such businesses which requires such drastic measures. The clear answer to this

---

[27] Aff. Bond, June 15, 1982, at 5.

[28] Cl. dep., March 4, 1982, at 19-20.

[29] Id. at 20.

[30] Id. at 20-21.

question by this Court and every other court that has dealt with the problem is that they may not. When a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest. *Shad*, 452 U.S. at 68. A city may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976). *First National Bank of Boston v. Belotti*, 435 U.S. 765, 786 (1978). The fact that the market might be unrestrained does not give a local community carte blanche to regulate without concern for the First Amendment. *Shad*, supra. When a claim of suppression of speech is raised, "(t)he inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of this ordinance upon freedom of expression." *Young*, 427 U.S. at 78, (Powell, J., concurring). Courts must be alert to the possibility of cities using the zoning power as a pretext for suppressing expression. Id. at 84. The record below does not support a conclusion that unusual problems, unique to adult theaters, require their removal from commercial areas to remote, isolated, industrial areas.[31]

Viewing Renton's ordinance in light of its impact on free speech, it is clear that it drastically impairs the

---

[31] In his concurrence in *Young*, Justice Powell observed that "(m)ost of the ill effects (from adult establishments) . . . appear to result from clustering itself rather than the operational characteristics of individual theaters." 427 U.S. at 82, n.5.

availability in Renton of nonobscene films for adult viewing.[32] Renton has asserted no substantial basis in fact for such a restriction nor has Renton investigated or experimented with less intrusive means for accomplishing as yet undelineated and undefined governmental goals.

Small communities can legitimately zone to deal with real problems associated with adult businesses. However, they may not zone in a manner which substantially burdens free expression. Appellants seek the right for small communities to act as censors of nonobscene speech, a right hitherto denied to all, large or small.

C. Deference To Legislative Fact Finding, In The Face Of Objective Evidence Within The Legislative Record Of A Motivation To Suppress Protected Speech, Would Be Chaotic To Settled Principles Of First Amendment Law.

Appellants misstate the holding of the Ninth Circuit Court of Appeals by suggesting that the Court ruled that vocal citizen distaste for free expression is sufficient to establish an improper governmental motive, assuming adequate proper evidence exists within the legislative record to support a compelling governmental interest.

The Ninth Circuit has made it clear that in making a determination of legislative motive, only the objective legislative history may be employed. The subjective

---

[32] See e.g., *Basiardanes v. City of Galveston*, 682 F.2d at 1214; *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D.Ga. 1981)

reasons of legislators may not be questioned. *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984). In the case at bar, no factual evidence appears in the legislative history to justify the ordinance's restrictions. Citizen comment, when it constitutes the entire objective legislative record, may be and should be considered in assessing the legislative body's motivations.

The Ninth Circuit holding that "where mixed motives are apparent," the Court is required to determine whether "a motivating factor in the zoning decision was to restrict plaintiff's exercise of First Amendment rights" is a correct statement of the law as promulgated by this Court. The test enunciated in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), requires that the assertion of the governmental interest must be unrelated to the suppression of free expression. Consideration of this part of the test necessarily involves a determination of the motives of the legislative body because purposeful governmental suppression of free expression is unconstitutional. *Central Hudson Gas v. Public Serv. Comm.*, 447 U.S. 557 (1980). Where evidence exists in the objective legislative history that suggests that suppression of free expression was a motivating factor, strict scrutiny of such an ordinance is required, both as to its ends and the means used to achieve those ends and judicial deference is no longer justified. *Arlington Heights v. Metropolitan*

Housing Development Corp., 429 U.S. 252, 265-266 (1977).[33] Determining whether suppression was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

The chronology and facts surrounding legislation may, indeed, suggest that a city has embarked on an effort to suppress free expression. *Young*, 427 U.S. at 80 (Powell, Jr., concurring). The record below is replete with objective signs that these ordinances were intimately related to a governmental intent to suppress free expression. Both the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter. *Playtime Theatres, Inc.*, 748 F.2d at 537. The mile separation from schools required by Ordinance No. 3526 was patently unreasonable and unconstitutional, and could only suggest an intent to suppress. The entire legislative process was commenced as a result of a communication from the mayor suggesting legislation to "respond to the public outcry" about adult businesses by designating "nonacceptable enterprises/localities."[34] Finally, counsel for Appellants

---

[33] At page 24 of the Jurisdictional Statement, Appellants incorrectly state the holding in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Rather than holding that improperly motivated citizen comment did not invalidate the ordinance, the Court held: "respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." 429 U.S. at 270. Appellants' statement also misstates the holding of the district court which held that evidence of improperly motivated citizen comment "does not warrant the conclusion that this motivated the defendants." 373 F.Supp. at 211.

[34] May 22, 1980 memorandum, Shinpoch to Trimm, Exhibit 6.

conceded at oral argument to the Ninth Circuit that Ordinance No. 3629 was passed, at least in part, to "create" a legislative history to support Ordinance No. 3526. Fabricating governmental reasons as a post hoc justification for prior legislation certainly suggests, if not compels, the conclusion that the initial legislation was passed for an improper motive or without adequate justification.

Given the record below, the Ninth Circuit said:

> Neither the facts before the Renton City Council nor those presented to the District Court appear to justify the ordinance's restriction on protected expression. Renton has not shown that it was not motivated by a desire to suppress speech based upon its content. Given the inferences raised in the record below us, we remand for reconsideration, particularly in light of *Tovar*.

748 F.2d at 537.

What the Appellants invite is a rule that ignores the intent of the legislative body and allows judicial review of one question only; i.e., whether the subject matter of the regulation is within the legislative power of the governmental body. In the area of expression protected by the First Amendment, strict judicial scrutiny of both means and ends has always been required by this Court. *Young*, 427 U.S. at 56: n. 12; *Interstate Circuit, Inc. v. Dallas*, 396 U.S. 671 (1968). Deference to legislative fact finding is not allowed. To rule otherwise would require this Court to overrule scores of cases which have oft repeated and endorsed these rules.

SUMMARY

The opinion of the Ninth Circuit Court of Appeals is consistent with the relevant decisions of this Court and federal courts throughout the country. Appellants have erroneously characterized the issues and their importance by misstating essential facts and attempting to recast essentially factual disputes into legal issues that go far beyond the holdings of the Ninth Circuit.

Appellees respectfully submit that neither Appellants' jurisdictional statement nor the opinion of the Court of Appeals for the Ninth Circuit raise substantial federal questions. Affirmance of the opinion below will not leave city governments and city planners without hope in finding reasonable approaches to the secondary effects, if any, of adult establishments. Rather, it will direct and guide those governments and planners to follow the mandates of this Court in order to achieve "innovative land use regulation." *Young*, 427 U.S. at 73 (Powell, J., concurring).

If cities are able to adequately identify and document a secondary effect upon their community of a particular land use which creates a substantial governmental interest in dealing with that problem, even if that land use be one that involves freedom of expression, the decisions of this Court do, and will continue to, allow narrowly drawn laws designed to serve those interests. The decision of the Ninth Circuit Court of Appeals does nothing to circumscribe this right.

CONCLUSION

For all of the above reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,
Jack R. Burns,
Counsel for Appellees